Supreme Court U.S.
FILED
JUN 21 19
JOSEPH F. SPANIOL
CLERK

88-2115

No.___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAZAR LEVITIN, Individually and as General Partner of OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership

Petitioner

v.

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division: Second Judicial Department.

Ronald Podolsky
Attorney for Petitioner
Fifteen Park Row
New York, N.Y. 10038
(212) 460-8218

Harvey 1. Strelzin
Attorney for Respondent Pomirchy
299 Broadway
New York, N.Y. 10007
(212) 233-0763

Kantor, Davidoff, Wolfe, Rabbino & Kass
Attorneys for Respondents Homburger and Ocean Parkway Medical Building
51 East 42d Street
New York, N.Y. 11111
(212) 682-8383

I. QUESTIONS PRESENTED FOR REVIEW

A. If a trial judge before trial determines that he was not properly assigned the case, but continues, over objection by a litigant, to trial and judgment against a defendant in a civil case, is the judgment thus procured a violation of equal protection of the laws and due process of law under the 14th Amendment?

B. If upon a complaint of a litigant that there has been political overreaching by one of the adversary attorneys, a court orders a jury trial in an equity case not normally triable by jury, is it a denial of due process of law if the trial judge vacates the said jury demand and proceeds to trial resulting in a judgment against judgement the said complaining litigant?

TABLE OF CONTENTS

QUESTIONS PRESENTED	1.
PARTIES	2.
TABLE OF AUTHORITIES	3.
STATUTORY PROVISIONS	4.
OPINIONS BELOW	6.
JURISDICTIONAL STATEMENT	6.
STATEMENT OF THE CASE	8.
REASONS FOR GRANTING THE WRIT	12.
CONCLUSION	22.

Appendix Table of Contents

Order of Supreme Court Appellate Division New York Supreme Court reported at 144 AD2d 655 A1

Order of Supreme Court Kings County denying reassignment of judge and jury trial A5

Judgment A8

Affirmation is support of motion A12

Excerpts from hearing on motion A23

II. Parties.

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LAZAR LEVITIN, Individually and as General Partner of OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership

Petitioner

v.

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division: Second Judicial Department.

Table of Authorities

Beeber v Empire Power Corp., 252 AD 786 — 20

Belski v New York C. Ry., 38 AD2d 822 — 20

Carel Almo Service v Weisskopf, 42 AD2d 953 — 21

Commonwealth Corp. v Casualty Co., 393 US 145 — 14

Parker v Rogerson, 33 AD2d 284, app dismd, 26 NY2d 964 — 20

People v LaPlaca, 17 AD2d 766 — 20

Phoenix Mut. Life Ins. Co. v Conway, 11 NY2d 367, 370. — 18

Public Service Mut. Ins. Co. v McGrath, 56 AD2d 812 — 20

Steinberg v Altschuler, 9 AD2d 211. — 20

Write v County of Monroe, 45 AD2d 932 — 20

Statutory Provisions

United States Constitution, 14th Amendment. — 12

Uniform Rules for the New York State Trial Courts, §202.6. — 9,16

N.Y. Civil Practice Law & Rules, §2221. — 19,22

VI. Constitutional & Statutory Provisions

United States Constitution, 14th Amenmndment.: All persons born or naturalized in the United Staes, and suject to the jurisdiction thereof, are citizens of the united States and of the State wherein they reside. No State shall make or enforce any law which shall abridiidge the privileges or immunities of citizens of the United States,; nor whall any State deprive any person of life liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Uniform Rules for the New York State Trial Courts, §202.6: Requests for Judicial Intervention. Any party filing with the court a notice of motion, order to show cause, application for an ex parte order, notice of petition, note of issue,

notice of medical or dental malpractice action, statement of new worth pursuant to section 263 of the Domestic Relations Law or request for the assignment of an action to a judge and a preliminary conference pursuant to section 202.12(b) of this Part, in an action to which a judge has not been assigned, shall attach to the papers to be filed a written request for judicial intervention on a form authorized by the Chief Administrator of the Courts, with proof of service on the other parties to the action. The court shall not accept for filing any such paper unless accompanied by a written request for judicial intervention. The filing of a request for judicial intervention pursuant to this shection shall cause the assignment of the action to a judge pursuant to section 202.3 of this Part. The clerk may require that

a self-addressed and stamped envelope accompany the request for judicial interventionl

N.Y. Civil Practice Law & Rules, §2221: Motions affecting prior order. A motion for leave to renewor to reargue a prior motion, for leave to appeal from, to to stay, vacate or modify, an order shall be made, on note, to the judge who signed the order, unless he is for any reason unable to hear it, except that: 1. if the order was made on default such motion may be made, on notice to any judge of the court; and 2. if the order wass made without notice such motion may be made, without noticce, to the judge who signed it, or, on not,e to any other judge of the court. A motion made to other than a p@proper judge under this rule shall be transferred to the proper judge.

IV. OPINIONS BELOW

Pomirchy v Levitin, et al, 144 AD2d 655 (2d Dep't, 1988,lv. to appeal denied, ____ NY2d ___ (March 28, 1989.), Appendix, p.A1

Pomirchy v Levitin, et al. Supreme Court Kings County, No. 19060/82 n.o.r., Sept 29, 1987. A5,

V. JURISDICTIONAL STATEMENT

The trial court, Supreme Court, State of New York, County of Kings (Held, J), directed entry of judgment against the Petitioner after a non jury trial, in the amount of $183,773.53, (A8).

Petitioner claimed that the trial Justice was improperly assigned to the case and at a time that the Petitioner was claiming that he was entitled to a jury trial, pursuant to a prior order of the court. (A12-23).

The Appellate Division of the Supreme Court of the State of New York: Second Judicial Department

affirmed the judgment, and leave to appeal to the Court of Appeals of the State of New York was denied. The basis of the appeals below was that the trial by a misassigned judge and the denial of the jury trial was a violation of the Due Process of Law and Equal Protection of the Laws components of the United States Constitution, Fourteenth Amendment.

The Court of Appeals of the State of New York denied leave to appeal on March 28, 1989.

Jurisdiction is conferred by reason of 28 U.S.C. 1254(1). See: Commonwealth Corp. v Casualty Co., 393 US 145.

VI: CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution, 14th Amendment.

VII STATEMENT OF THE CASE.

Petitioner was the sole General Partner of OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership wherein Respondent HANS HOMBURGER was a Limited Partner, and Respondent SEMYON POMIRCHY was an investor in part of Petitioner's interest in the Limited Partnership. Another action, brought on behalf of the limited partner, Hans Homburger, for an accounting, HOMBURGER v LEVITIN, POMIRCHY, and OCEAN PARKWAY MEDICAL BUILDING, had been instituted prior to the complaint in this action, and both were ordered for a joint trial in by Held, J. sitting in the motion part.

Prior to the order for a joint trial, Petitioner had complained that the plaintiff's attorney in the Pomirchy case was engaging in political overreaching, and requested a change of venue from Kings County

New York, to Nassau County. The motion for a change of venue was denied by Justice Adler, who did not rule on whether or not there was such overreaching, but directed that a trial by jury be held as the proper procedure to be followed. (A25)

In order for the Homburger and Pomirchy cases to be place on the calendar, procedures had to be followed respecting the Individual Assignment of Judges, as embraced in Individual Assignment (IAS) procedures. The first case placed on the calendar was the Homburger case, which was placed on the calendar by the filing of a Request for Judicial Intervention, [Hereinafter "RJI], which, under the Uniform Rules for the New York State Trial Courts, §202.6, must be supported by motion papers or other documents requesting for certain relief.

The RJI listed the Pomirchy case as one to be jointly tried with the Homburger case. The matter was assigned by random selection to Justice Vaccaro.

Shortly thereafter, the attorney for Pomirchy filed a Request for Judicial Intervention. It had a later machine stamped number, and was not supported by any underlying papers. (A23-24). The case was assigned to Justice Held. Thereafter, the machine stamped number on the Pomirchy RJI was changed by hand and an earlier number than that assigned by machine to the Homburger case was placed thereon.

Before trial, a hearing was held on a motion by the Petitioner to have the cases assigned to Justice Vaccaro, the justice assigned to the Homburger case, or alternatively assigned again by random selection to another justice on the grounds that as the Homburger

case was the first filed case, and listed the Pomirchy case as one to be jointly tried with it as per court order, the two cases should have been assigned to Justice Vaccaro, and as the Pomirchy RJI was not supported by underlying papers as required by the court rules, the assignment of the joint trial to Justice Held was improper. (A23-24)

During a hearing into the application for reassignment, heard by Justice Held, the clerk of the court testified that as the first RJI, which was supported by underlying papers was filed in the joined cases was by Homburger, which drew Justice Vaccaro, and as the Pomirchy RJI was filed after the Homburger RJI and was not supported by any underlying papers, which drew Justice Held, that the cases should have been sent to Justice Vaccaro. Upon proof by

testimony of these facts, A22-24, Justice Held who was conducting the hearing exclaimed:

> THE COURT: And that was Judge Vaccaro. And I've been doing all this work and having all these headaches then, is that right? And now is it too late for me to get out or am I stuck with it? (A24).

Thereafter Justice Held consulted with the Administrative justice of Supreme Court Kings County who indicated that as Justice Held had the cases already and was familiar with the case, he should continue on the case. A6-7 The case was then jointly tried with the Homburger case non-jury which resulted in the judgment in favor of Pomirchy which is the subject of this petition, and a judgment in favor of Homburger in the jointly tried matter. The Homburger case was affirmed at 140 AD3d 583, and leave to appeal to the Court of Appeals was denied. This Petition relates only to the Pomrichy case.

VIII REASONS FOR GRANTING THE WRIT.

The Fourteenth Amendment prohibits the denial of due process of law or of equal

protection of the laws to any person by state action. In the court below, the joint trial was assigned to Justice Held by a procedure which was in violation of the rules for the Individual Assignment of Justices. That is the standard by which equal protecton of the laws is to be judged. All litigants are entitled to a random assignment of justices, and anything which departs from that standard casts the jurisdiction of the justice who ultimately tries the case in severe constitutional jeopardy.

Here the trial justice had concluded prior to trial that he was not the properly assigned justice. (A23-24) Such determination was made upon the complaint of the Petitioner who objected to his continuing on the case. Whether the misassignment was due to mistake, or design is not material when it comes to the question

of proper assignment of justices. In the face of the documented deviation from the designated procedure, unless all parties consent to the continued jurisdiction of that justice, due process of law and equal protection of the laws requires a new random assignment. The petitioner requested the assignment be made to Justice Vaccaro, the first Justice assigned when the first RJI in Homburger was properly filed, or, alternatively, to another justice to be randomly selected. (A24) This was and is the due process of law entitlement of the Petitioner under the circumstances.

In Commonwealth Corp. v Casualty Co., 393 US 145, this court ruled that a tribunal permitted by law to try cases and controversies not only must be unbiased, but also must avoid even the appearance of bias, and that the appearance of partiality is a

constitutional impediment to an award by that tribunal. This, despite the fact that this concurring opinion of Justice White in footnote at p. 151 observed that the arbitrators were found to be entirely fair and impartial, and the dissent of Justice Fortas agreed at p. 153 that the arbitrator conducted a fair and impartial hearing and rendered a proper determination of the issues before them.

The Appellate Division of the New York Supreme Court indicated that the retention of the case by justice Held was appropriate by ascribing the his assignment of the joint trial to him to the apparant simultaneous filing of two RJI statements and the resolving of the conflict administratively. (A3) In light of the fact that it was demonstrated by the court clerk's testimony that the Pomirchy Request

for Judicial Intervention was not authorized (A23-23) and in light of prior allegations of overreaching by Pomirchy's counsel which had been the subject of motions long prior thereto. (A14, A19-21) which motion led to a prior judge's ordering of a Jury trial in the Pomirchy case, the deviation from the designated procedure precipitated the motion for reassignment.

As the trial justice recognized even before the trial began that he had not been properly assigned, (A23-24) it was the justice's duty to order either that the cases be referred to Justice Vaccaro, or that they be reassigned by random selection as required by the rules of the court. Uniform Rules for the New York State Trial Courts, §202.6.

It was not too late to "get off the case", as trial had not yet begun.

That the justice was familiar with the cases is not a constitutionally appropriate response to the question of the justice's jurisdiction to continue on the case. The assignment of the joint trial to Justice Held was demonstrated to have been in violation of the RJI rules in that the only RJI which was properly filed with supporting papers was the first RJI in the Hamburger case. (A23). In the absence of consent by all litigants, Justice Held should not have been permitted to continue on the case. The jurisdiction of the trial justice was lacking and the judgment procured thereby was and is a deprivation of due process of law. As the Petitioner was deprived of compliance with RJI court procedures he was deprived of equal protection of the laws as well, all in violation of the 14 Amendment.

Once the misdirection of the case

has been demonstrated, the wrong justice has no jurisdiction to continue on the case absent the consent of all litigants. The showing of mistake, malice, wrongdoing, or bias is not a necessary prerequisite burden of the Petitioner when it has been demonstrated that the trial justice was assigned improperly and not in conformity with the rules of procedure of the court.

With respect to the issue of whether the trial should have been before a jury, the Appellate Division observed that because the complaint was founded in equity which is not triable by jury, it was not error for the trial justice to proceed without a jury. (A1, A3-4), citing Phoenix Mut. Life Ins. Co. v Conway, 11 NY2d 367, 370. Although it is quite true that equitable causes are not tried by a jury, a court of equity can direct a

jury trial of issues is in fairness and equity it is appropriate to do so. Justice Adler, on a motion made long before the assignment of the case for trial had ordered a jury trial in response to a motion by the Petitioner requesting a change of venue and disqualification of Pomirchy's attorney.(A25)

The order directing a jury trial was not appealed nor was there any motion to vacate it. It was done by Justice Held sua sponte. Civil procedure in New York is governed by the Civil Practice Law and Rules, hereinafter CPLR. That statute defines due process of law under the circumstances. By directing that the trial proceed in the absence of the jury, the trial justice in effect reversed the order of justice Adler, a justice of coordinate jurisdiction all in violation of CPLR §2221. Justice

of coordinate jurisdiction cannot be appellate tribunals for each other. The statute and the courts of New York are committed to the doctrine that one judge of coordinate jurisdiction should not vacate, modify or depart from a ruling or order made by a colegue of equal rank in he same case. Public Service Mut. Ins. Co. v McGrath, 56 AD2d 812; Belski v New York C. Ry., 38 AD2d 822; Peo. v LaPlaca, 17 AD2d 766; Beeber v Empire Power Corp., 252 AD 786; Parker v Rogerson, 33 AD2d 284, app dismd, 26 NY2d 964; Write v County of Monroe, 45 AD2d 932.. It has been held that the antecedent decsision of an associate justice of the same court is binding upon another jurisce of the same court and that the second justice should decline to review the issue determined by the first justice. Steinberg v Altschuler, 9 AD2d 211.

The reason for such a rule is in complete harmony with due process of law and fairnerss. Any other procedure would render the decisional process uncertain of any finality, reduce the administration of justice to an anarchistic shambles, destroy the morale of the courthouse, create uncertainty, confusion and insecuityamong court personnel, place the litigant in a revolving door leading from judge to judge as each judge alters the other's determination, array the contending jurists in professional fratricidal conflict and prevent the ultimate determination of the rights of the parties by appropriate appellate review of a final definitive determination.

In Carel Almo Service v Weisskopf, 42 AD2d 953 the court observed that a prior order of another

justice had not been appealed, that "***We have held repeatedly under such circumstances that it is improper for a Justice of coordinate jurisdiction to overrule the action of the prior Justice.***" As Justice Adler had ordered a jury trial, not because the matters were equity matters, but in response to a motion by Petitioner alleging perceived unfairness, it was a denial of due process of law as defined by CPLR §2221 and the cases cited.

IX. CONCLUSION: The Petition for a Writ of Certiorari should be granted.

Respectfully submitted:

Ronald Podolsky

Attorney for Petitioner.

Seymon Pomirchy, Respondent v Lazar Levitin, Appellant.
Opinion of Appellate Division reported at 144 AD2d 655.

The appeal from the intermediate order must be dismissed because the right of direct appeal theregfrom terminated with the entry of judgment in the action. (see, matter of Aho, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (CPLR 5501[a][1])

The defendant Levitin argues that (1) he was denied his right to equal protection and due process of laws when, as a result of multiple requests for judicial intervention, the instant case was assigned to Justice Held rather than to Justice Vaccaro, and (2) he was deprived of a jury trial which he had demanded. however, these arguments were previously rejected by this court in the related appeal of

Homburger v Levitin (140 AD2d 583, 584) wherein this court stated:

"On appeal the applellants contend with respect to the order dated September 29, 1987, that they were denied equal protection and due process rights, when, as the result of the simultaneous filing of multiple requests for judicial intervention, the case was assigned to Justice Held rather than to Justice Vaccaro. The appeal from the intermediate order must be dismissed because the right of direct appeal there from terminated with the entry of judgment in the action. (see, matter of Aho, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeal from the judgment (CPLR 5501[a][1]) In any event we note that at the inception of the Individual Assignment System the parties

simultaneously filed requests for judicial intervention, resulting in the random assignment of the instant case to two different Justices. This ministerial conflict appears to have been resolved by the Clerk's Office without externa intervention. There is no evidence in the record of bias, prejudice or wrongdoing ont he part of the Justice who heard the case, and whose retention of the action was recommended by the Administrative Justice of the Supreme Court, Kings County. There is therefore no impropriety or even appearance of impropriety in the court's handling of this matter.

"On appeal from the judgment, the appellants contend that they were denied their constitutional right to a jury trial. The relief sought in the plaintiff's complaint was entirely equitable in nature. it is well

established that where a plaintiff's conplaint states an action in equity, it is triable by the court without a jury, and defendant, as a matter of law, is not entitled to a trial by jury. [Phoenix Mut. Life Ins. Co. v. Conway, 11 NY2d 367, 370). Even where, as incidental to the main relief prayed for, the complainant askes for money damages, a separate trial by jury is not within the purview of the constitutional guarantee (Jamaica Sav. Bank v M.S. Investing Co., Inc., 274 NY 215,221)."

We have examined the defendant Levitin's remaining contentions and find them to be without merit.

November 28, 1988 (Unanimous opinion)

An application for leave to appeal was denied by the Court of Appeals of New York on March 28, 1989. __NY2d__.

[same caption] Order September 29, 1987 by Held, J., Supreme Court Kings County.
Motion by: Levitin. Relief Requested: Reassignment of case.
Order: Lazar levitin moves by notice of motion and an attorney's affirmation together with exhibits annexed thereto to have this court recuse itself and the case removed to either Mr. Justice Vaccaro or another justice randomly selected. The basis for this moition is that the movant claims that administratively this case was improperly noticed for joint trial before this court. The attorneys for the plaintiff homburger have filed an affidavit in opposition together with exhibits annexed thereto. The attorney for pomirchy has also filed opposition papers to the within motion. A reply affirmation on behal for Levitin has been filed.

a hearing was held and the testimony of clerks Carmine Azzato and Robert Leone was heard, together with

the argument of each attorney. At that hearing it was determined, among other matters, tht an alleged cause of action by Levitin as a plaintiff against Pomirchy as a defendant was not properly joined to the cases herein. The caption is amended to delete this alleged third case.

This court has had significant contact with all matters herein and has scheduled a trial for October 13, 1987.

Since it is alleged that an administrative error caused the captioned matters to be before this court the motion was referred to Hon. Leonard E. Yoswein, the Administrative Judge of this court. In reponse Mr. Justice Yoswein, in a memorandum dated September 23, 1987 replied:

"In reponse to your inquiry, please be advised that I see no reason to recuse yourself. it is my understanding that

2 requests for judicial intervention were filed more or less simultaneously and were subjected to computer judicial assignment. Although both Vacaro and yourself were assigned as a result, it appears to me that the appropriate determination should be for the assignment to be made to you since you have a greater degree of familarity as a result of your prior handling of this mattter while presiding in Trial I."

Since neither Justice Yoswein nor this court sees any substantive reason for this court to recuse itself, all cases will remain in IAS Part 6 and a joint trial will take place, as previously scheduled, on October 13, 1987 at 1:30 a.m. A copy of this order is being mailed to the attorneys for all parties herein. [endorsement omitted]

[same caption] Judgment dated December 11, 1987.

The above entitled action having duly come on for joint trial, without a jury, on 10/14/87, per Order of this Court made at Trial Term Part I thereof on 10/29/84, hereby incorporated herein by reference thereto, and the said trial having continued from day to day from 10/14/887 to conclusion therof on 11/5/87, the Court having found on all of the said evidence, that Plaintiff Pomirchy was and still is a partner with Defendant Levitin in said Defendant's 79%cashflow interest in OCEAN PARKWAY MEDICAL BUILDING, hereinafter "OPMB", a Limited Partnership under the contract of 91/80 between Plaintiff Pomirchy and Defendant Levitin, wherein said Defendant sold to said Plaintiff a 39.5% interest in said Defendant's 79%cashflow interest, Plaintiff

Pomirchy paid to Defendant Levitin an addiional sum of $25,100 which said wum was wrongfully converted by Levitin for his own use.

The court further determines that defendant Levitin has wrongfully converted to his own use and kept for his own enrichment cashflow assets of the Partnership in the sum of $314,500., of which plaintiff Pomirchy was and still is the owner of 39.5% of 79% thereof, and the Court thereupon having rendered a decision on 11/5/87 by which the Court assessed the money damages of Plaintiff Pomirchy as follows:

a. 39.5% of 79% of the sum of $314.500., or $98,139.73 plus the sum of $25,100. paid to Defendant Levitin by plaintiff Pomirchy over and above the 9/1/80 contract price so that the money damages of Plaintiff were assessed by the Court in the final sum

of $123,239.72 with interest thereon from commencement of the action on 8/14/82 in the sum of for a total of with costs and disbursements as taxed by the cler of the court in ths sum of plus costs heretofore taxed on 2/13/87 in the amount of $308.71 awarded by the Appellate Divsion to Plaintiff Pommirchy as respondent against Defendant Levitin as Appellant for a total of $.

Now on motion of Harvey L. Strelzin, Esq., attorney for plaintiff Pomirchy by Rachael B. Backer, Esq., of counsel, it is

ADJUDGED that Plaintiff Semyon Pomirchy, residing at 1201 Ocean Parkway, Apt. 4E, Brooklyn, New York 11230, shall recover from Defendant LAZAR LEVITIN, residing at 11 Wooley Lane, Greatneck, New York, 11023 the sum of $123,239.72 with interest thereon from 8/14/82 in the sum of

$59,505.60 plus costs and disbursements as taxed in the sum of $719.50 and the costs and disbursements on appeal of $308.71, in all amounting to $183,773.53, as Plaintiff's money damages, and it is further,

Adjudged that Plaintiff Semyon Pomirchy shall have execution hereon against Defendant Lazar Levitin. [Endorsements omitted.]

Affirmation in support of motion
for reassignment and for jury trial.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

HANS HOMBURGER, As a Limited Partner OF OCEAN PARKWAY MEDICAL BUILDING,
Plaintiff,

-against-

LAZAR LEVITIN, Individually and As A General Partner, SEMYON POMIRCHY and OCEAN PARKSWAY MEDICAL BUILDING, A Limited Partnership,
Defendants

SEMYON POMIRCHY,
Plaintiff,

-against-

LAZAR LEVITIN, Individually and As General Partner, HANS HOMBURGER, As A Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership
Defendants

LAZAR LEVITIN,
Plaintiff,

-against-
SEMYON POMIRCHY,

Defendant

RONALD PODOLSKY an attorney duly admitted to practice before the courts of the state certifies the within as true under penalty of perjury:

That he makes this affirmation in support of a motion to assign the

trial of these cases to Justice Vacarro and for all issues to be tried before a jury, or, in the alternatve, having a justice selected at random by the appropriate individual assignment procedures of the court.

That your affirmant has just been retained by LAZAR LEVITIN as his attorney, and has had an opportunity to review the papers is the cases. Affirmant is aware that prior attempts to change venue have been denied by this court. Affirmant is also aware of the Order of this Court that the issues herein be tried by jury.

That with respect the order of trial by jury, affirmant has seen no motion or later order vacating it, nor has affirmant become aware of any reversal or modification of that order on appeal. Affirmant has been informed by Mr. Levitin that it is the intention of Justice Held to proceed

to trial of an issue without a jury.

The prior attempts to change venue resulted in orders denying such requests. The papers before the court on those occasions contained allegations by various parties of questionable practices and assertions in response thereto denying such allegations. The instant motion is for the matter to be tried before Justice Vaccaro, or in the alternative, that a Justice be asigned by IAS lot. As the court has already considered the various papers on prior motions respecting change of venue, affirmant will limit himself to the documentary evidence which he believes warrants the relief requested.

1. On December 18, 1985, a request for Judicial Intervention was filed by KANTOR, DAVIDOFF, WOLFE, RABINO & KASS, P.C., Attorneys for HANS HOMBURGER. The request for

Judicial Intervention is annexed hereto as **Ex. A** The request was machine stamped with **Control Number** 86-000776M in the regualar course of IAS assignment procedures. It was supported by Notice of Motion and Note of Issue for default judgment. the IAS Entry Date is set at December 18, 1985. It was signed on the back by ROBIN WOLFE. That case was assigned to Justice Vaccaro. The "no" box to the question "Has a request for judicial intervention been previously requested was chosen.

2. On December 19, 1985, the atorneys for POMIRCHY filed a a request for judicial intervention. There appears to be no motion accompanying the request for judicial intervention, and there aappears to be no authority to file same in the absence of such papers. In any event the request was machine stamped with

Control Number 86-000811M. A copy is annexed at Ex. B. The request was signed by HARVEY L. STRELZIN, ESQ. Attorney for Pomirchy. The "yes" box to the question: "Has a request for Judicial Intervention been previously requested, was chosen. Thus, at this point both cases should have been assigned to Justice Vaccaro, he being the justice assigned to the earlier of the two Control Numbers.

4. Thereafter, a handwritten request for judicial intervention which appears to be made out by Mr. Wolfe, although not signed by him appears in Ex. C annexed hereto. There is a hadwritten Control Number 86-000834M. The "no" box to the question "Has a request for judicial intervention been previously requested" was chosen. It appears to relate to the same Nature of Judicail Intervention filed by Mr. Wolfe which

had been given machine generated Control Number 86 000776M which has been annexed hereto as "Ex. A." Moreover, for some unexplained reason the machine generated Control Number of Ex. A, 86-000776M is crossed out and the handwritten control number 86-000834M, the same non-machine generated handwritten control number on Ex. C is placed thereon.

5. The fact that the attorney for HOMBURGER filed the first and third requests, Exs. A&C and that the cases were assigned to the justice designated by the second request for judicial intervention with the later control number than the first such request is not otherwise explained. One can speculate as to whether it was accomplished through inappropriate design, mistake or inadvertence. Such speculation has been fuled in the past by allegations that Pomichy boasted

prior to the events herein described that his attorney was a former state senator and had a lot of political power in Kings County, and that the case would be assigned to Justice Held, before the fact. The second filing by the attorney for Homburger and the handwritten control number could suggest that the second filing was made to facilitate the transfer of the case from the justice assigned by lot, Vaccaro on the first filing. One could speculate that the assignment to Justice Held was the result of error or inadvertance by the clerk of the court. Irrespective of such speculation, the fact remains that the first assigned justice appears to be Justice Vaccaro generated by lot through the filing of Ex. A.

6. Mr. Levitin has provided affirmant with a copy of a document he discovered in the court file, annexed

hereto as ex. D. It appears to be handwritten notes respecting the cases and indicates that they are "To be reassigned". The memo inidcates that the Pomirchy v Levitan case, is action #1 with control number 86-811 and that Homburger v Levitin is action No. 2 with control number 86-834. It concludes tht "Since Judge Held's case has earlier control # He should have both cases as per advice of Carmine Azzata". The notes make no mention of the first request for judicial intervention assigned machine generated Control No. 86-000776M (Ex. A) which was assigned to Justice Vaccaro, and which has the earliest control number. As the apparant clerk's notes suggest that it is the earlier control number which governs, the documentary evidence alluded to herein shold lead to the inescapable conclusion that the assignment of the

cases should have been to Justice Vaccaro.

The documentary evidence alluded to herein shows that all considerations being laid aside, there appears to be an unexplained and undocumented result of the cases being assigned to Justice Held. As the Individual Assignment of justices is to be at random selection, and as the present status of the cases appears to deviate from such a standard, the process whereby the cases came to be before Justice Held has caused the random selection of justice assurances to the litigating public to be placed in jeopardy. This suggestion is made by affirmant without advancing any assertion of impropriety founded on evil intent on the part of anyone, which have been made in the past. The mere fact that the documentation consisting of inconsistent numerical and assignment

results suggests an appearance that something out of the ordinary has occurred. This alone should convince this court that the application herein is appropriate. This is so irrespective of the existence or non-existence of propriety in what happened. It is the appearance of impropriety which is controlling here.

As the attorney who will be trying the case, your affirmant normally would have no objection to trying it before any of the justices in Kings County. However, in light of the assignment history of this case, your affirmant must support the application for reassignment of justice as well as trial by jury heretofore requested herein, as the confidence in the total randomness component of the assignment of justices is at stake.

BY REASON WHEREOF it is

respectfully requested that the cases be resubmitted to the clerk for reassignement of a justice, or that the matter be assigned to Justice Vaccaro, the first justice assigned with the earlier **Control Number**, and that the matter be tried by jury, with such other relief as to the court may seem just and proper.

September 2, 1987 [Endorsements and Exhibits omitted]

[Same Caption] Excerpts from pp. 27-40 of minutes before Held, J., Supreme Court Kings County. September 15, 1987

THE COURT: Mr. Leone, Whose RJI was assigned to me, and who's RJI was assigned to Judge Vaccaro? ***

MR. LEONE: Pomirchy, that was assigned to yourself.***5847/84 was assigned to Judge Vaccaro.

THE COURT: Both RJI's were filed the same day?

MR. LEONE: No, they were initialized the same day. In other words, if they came in we would check them; but they wen int the computer the same day.***

THE COURT: Was counsel for Pomirchy supposed to file an RJI under those circumstances?

MR. LEONE: No.

THE COURT: She should never have filed an RJI?

MR. LEONE: That's right. Mr. Wolfe's [Homburger's attorney] RJI

would have given your the control number and would have been assigned to whoever the computer --

THE COURT: And that was Judge Vaccaro. And I've been doing all this work and having all these headaches then, is that right? And now is it too late for me to get out or am I stuck with it.*****

MR. PODOLSKY (Levitin's Attorney) Your Honor, if the case is taken from you, lest there be any indication on my part thatt I have a preference of Judge Vaccaro, I don't. it is immaterial to me whether it's sent into Vaccor or a new lot assignment, just let the chips fall where they may. ive taken that position. I'm not looking to direct the case in any -- to any particular judge. I just want a lot assignment.***

[Same Caption]

Order of Adler, J., dated may 10, 1984

[* * *

Upon the foregoing papers the motion of the defendant Levitin for a order directing that all issues of fact be tried before a jury is granted.

It is alleged that the attorney for the plaintiff Pomirchy came into possession of certain confidential information from the defendant in his professional capacity which information is "protected". The Court denies that portion of the defendants' motion which seeeks to disqualify Mr. Stelzin from acting as attorney for Ponmirchy, reserving, however, to the trial judge, the right to impose such restrictions upon Mr. Strelzin which may be justified during trial. In all other respects the motion is denied.

(Endorsement Omitted).

FILED
SEP 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2115

IN THE

Supreme Court of the United States

October Term, 1988

LAZAR LEVITIN, Individually and as General Partner of OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership,
Petitioner,

against

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, A Limited Partnership,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

HARVEY L. STRELZIN
Counsel of Record
and
RACHEL B. BACKER, *of Counsel*
Attorneys for Respondent Semyon Pomirchy
299 Broadway—Suite 1300
New York, NY 10007
(212) 233-0763 and (212) 732-0970

THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1989
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(7893)

BEST AVAILABLE COPY

TABLE OF CONTENTS.

	Page
Preliminary Statement	1
Counterstatement of the Case . .	5
Conclusion	14
Addendum	16
Resume of Pertinent Orders and Judgments . . .	16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

- X

LAZAR LEVITIN, Individually and as General Partner of OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership,

Petitioner,

v.

SEMYON POMIRCHY, HANS HOMBURGER as a Limited Partner and OCEAN PARKWAY MEDICAL BUILDING, a Limited Partnership,

Respondents.

- X

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT.

The sole business of Ocean Parkway Medical Building, the suject Limited Partnership, has been, and still is its rental as prime lessee to subtenants as

sub-lessees, several retail stores comprising a so-called "Medical Center," in a building located at 3049-51 Ocean Parkway, Brooklyn, New York, for use respectively by the sublessees as professional offices for the practice of Dentistry, Audiology, Hearing Aid Services, Ear, Nose & Throat Treatment and for a Retail Pharmacy.

Under the basic Limited Partnership Agreement dated May 1, 1980, the original capital of the Limited Partnership was fixed at $40,000, of which respondent Homburger paid $35,000 for his 21% interest as a Limited Partner and Levitin contributed $5,000 for his interest as a General Partner. Further, under the basic Limited Partnership Agreement of May 1, 1980, which named Levitin as General Partner, the respective distributable shares of the

Partnership of at least 80% of the distributable Partnership cash flow was derived from rents paid by the subtenants net of rent payable to the prime Landlord, as follows:

a. 79% to Levitin as a General Partner

b. 21% to Homburger as a Limited Partner.

The basic Limited Partnership Agreement further provided that Levitin as General Partner had the right to sell to respondent Pomirchy, as a Special Limited Partner, 39.5% of Levitin's 79% cash flow interest for a price of $40,000 paid to Levitin by Pomirchy. Thereafter, Levitin demanded of respondent Pomirchy an additional $25,100 which Pomirchy paid to Levitin on Levitin's representation to Pomirchy that said additional sum was needed to rescue the Partnership from

the "edge of financial collapse," so that the total cost to Pomirchy of his 39.5% of Levitin's 79% cash flow interest totalled $65,100.

As will be indicated hereinafter, eventually after joint trial of the action by respondent Homburger and respondent Pomirchy against Levitin, he was ousted as General Partner because of his wrongful misappropriation of Partnership funds in the amount of $314,500, and replaced as General Partner by respondent Homburger. Further, upon the law and the facts proved at the said joint trial, separate judgments against Levitin were awarded to respondent Homburger in the amount of $112,651 with interest and costs and to respondent Pomirchy, in the amount of $183,773.53, with interest and costs, for the wrongful failure by Levitin to

pay to said respondents their respective rights to Partnership cash flow, i.e. 21% payable to respondent Homburger, as a Limited Partner, and 39.5% of 79% payable to respondent Pomirchy, as a Special Limited Partner.

COUNTERSTATEMENT OF THE CASE.

Respondent Semyon Pomirchy opposes the instant petition for a writ of certiorari to review the decision and judgment awarded to this respondent against the petitioner after joint trial with the case of respondent Homburger without a jury before Hon. Gerald Held, Justice of the Supreme Court of the State of New York, County of Kings, affirmed on appeals taken by the petitioner to the Supreme Court of the State of New York, Appellate Division, Second Department, and sustained by the

State of New York Court of Appeals which denied petitioner's motion for leave to appeal to that Court.

As will be demonstrated herein, there is no basis on the law and on the facts of the case, either under the Constitution of the United States, the Rules of this Court, any Federal Statute, Rule of Law, or Decisional Precedent, for the relief now sought by the petitioner.

As will be further demonstrated herein, the instant petition is but one more device of the petitioner to escape the consequences of his own unlawful misconduct and egregious malfeasance in his operation of the business and financial affairs of the Limited Partnership while he was the General Partner thereof, justly resulting in his total ouster from the partnership, on absolute,

undisputed proof at the trial that petitioner Levitin had wrongfully converted to his own use partnership money totalling the sum of $314,500 in violation of the terms of the Partnership Agreement and of the rights thereunder of respondents Pomirchy and Homburger. None of the arguments used by the petitioner justify his petition for a writ of certiorari, all of which ignore the true facts of his wrongdoing, revealed upon trial and affirmed on all of his appeals. Moreover, it is notable that the petitioner's multiple appeals and now his instant petition, have been employed by him to evade to this day payment of the judgments awarded to respondent Pomirchy in the sum of $183,773.53, as well as to respondent Homburger in the sum of $112,651. Even levies on his personal financial resources attempted by

Sheriffs under executions on the Judgments served upon petitioner have been unavailing since the whereabouts of his financial resources could never be discovered and he has never even responded to the Sheriffs when the executions were served upon him.

The argument of petitioner Levitin in support of his petition demonstrates his unconscionable motives and strategy in his attempt to induce this Court to exercise its jurisdiction herein. Thus, he maligns the integrity of Mr. Strelzin, Counsel of Record for respondent Pomirchy, by insinuating "political overreaching" by Mr. Strelzin as a former member of the Legislature of the State of New York, to which he had been elected as an Assemblyman thereof, representing the County of Kings. On the basis of this insinuation, petitioner

had moved for a change of venue to Nassau County, claiming that the entire Kings County Judiciary was under the political influence of Mr. Strelzin. This motion was denied, and the case remained under the original jurisdiction of the Supreme Court, Kings County, and of the Appellate Division, Second Department thereof. Nor did the Court of Appeals, the last Court of Appellate Jurisdiction in the State of New York, accept any of these inuendoes by petitioner in denying Levitin leave to appeal to that Court.

Similarly, with regard to the Order of Justice Adler granting Levitin's request for trial by jury, Levitin does not state that the said Order of Justice Adler denied that portion of Levitin's motion which sought "to disqualify Mr. Strelzin from acting as

attorney for Pomirchy, reserving however, to the trial judge, the right to impose such restrictions upon Mr. Strelzin which may be justified during trial," and denied Levitin's motion in all other respects. Needless to say, no such inferences were found by Justice Held, as the Trial Judge, or by any of the Appeal Justices, and the joint trial before Justice Held was properly conducted without a jury since the relief sought in plaintiff Pomirchy's case was entirely equitable in nature. Thus, on Levitin's appeal from the judgment awarded to Pomirchy against Levitin after trial without a jury, the Justices of the Appellate Division, Second Department, of the Supreme Court of the State of New York, in their Order of November 28, 1988, rejected Levitin's claim that he was

denied his constitutional right to a jury trial, on the ground that the relief sought in Pomirchy's complaint being entirely equitable in nature, it is well established that where a plaintiff's complaint states an action in equity, it is triable without a jury, and the defendant as a matter of law is not entitled to a jury trial. Even where, as incidental to the main relief prayed for, the complaint asks for money damages, a separate trial by jury is not within the purview of the constitutional guarantee.

It is the same as to Levitin's contentions with regard to assignment of the trial to the "wrong judge" for joint trial with Homburger's case.

Notably on the same appeal, dated November 28, 1988, Levitin claimed that the case had been wrongly assigned to

Judge Held for joint trial with the case of respondent Homburger. The Appellate Justices rejected his claim as follows:

> "In any event, we note that at the inception of the Individual Assignment System, the parties simultaneously filed requests for judicial intervention, resulting in the random assignment of the instant case to two different justices. This material conflict appears to have been resolved by the Clerk's Office without external intervention. There is no evidence in the record of bias, prejudice or wrongdoing on the part of the Justice who heard the case, and whose retention of the action was recommended by the Administrative Justice of the Supreme Court, Kings County. There is therefore no impropriety or even appearance of impropriety in the Court's handling of this matter."

In this regard, it is notable that

Levitin himself had applied *pro se* to Justice Yoswein, the Chief Administrative Judge, for re-assignment of the case to Justice Vaccaro. Not only was Levitin's application denied by Justice Yoswein, but trial of the case was directed by Justice Yoswein to remain with Justice Held for joint trial with the Homburger case against Levitin, pursuant to a still outstanding Order dated October 29, 1984, never appealed from, made at Trial Term, Part I of the Supreme Court of the State of New York, County of Kings. That Order granted a motion brought on by Mr. Strelzin on behalf of Pomirchy for an Order directing joint trial of Pomirchy's case against Levitin, as Action #1 with Homburger's case against Levitin as Action #2 on the ground that all of the matters in issue in both cases involved

common questions of law and of fact. Homburger's counsel concurred in the motion, and Norman L. Rosenthal, Levitin's then counsel, appeared in opposition, but when, after due deliberation the motion was granted, the Order dated October 29, 1984 was entered "on the motion" of Mr. Rosenthal, directing that the Pomirchy case, as Action #1 be tried jointly with the Homburger case as Action #2, and that the joint trial of both cases be restored to the Trial Calendar accordingly.

CONCLUSION.

Upon the facts and the law of the case, there is no basis for review thereof by the Supreme Court of the United States, and the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HARVEY L. STRELZIN, ESQ.
299 Broadway-Suite 1300
New York, NY 10007
(212) 233-0763
Counsel of Record

and

RACHEL B. BACKER, ESQ.
Of Counsel
299 Broadway-Suite 1300
New York, NY 10007
(212) 732-0970

Attorneys for Respondent-
Pomirchy

ADDENDUM.

Resume of Pertinent Orders and Judgments

a. State of New York Court of Appeals, Order dated March 28, 1989, which denied Levitin's motion for leave to appeal to that Court in the Pomirchy case.

b. Supreme Court of the State of New York, Appellate Division, Second Department, dated November 28, 1988, which affirmed denial of Levitin's motion in the Court below to reassign the case to another judge, and affirmed the judgment dated December 11, 1987 awarded to Pomirchy against Levitin after a joint trial without a jury in the sum of $183,773.53, plus interest and costs.

c. Order of the Supreme Court of the State of New York, Trial Term Part I, dated October 29, 1984, never appealed from, directing joint trial of the case of Semyon Pomirchy v. Lazar Levitin, et al., with the case of Hans Homburger v. Lazar Levitin, resulting in a judgment dated November 20, 1987, entered December 1, 1987, awarded to Hans Homburger against Lazar Levitin after joint trial without a jury in the sum of $112,651 plus interest and costs.

d. Judgment awarded with interest, costs and disbursements after Joint Trial to Semyon Pomirchy v. Lazar Levitin in the sum of $183,773.53, and to Hans Homburger v. Lazar Levitin in the sum of $112,651, dated November 20, 1987, entered December 1, 1987.